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24 **UNITED STATES DISTRICT COURT**

25 **NORTHERN DISTRICT OF CALIFORNIA**

26 **SAN FRANCISCO DIVISION**

27 UNITED STATES OF AMERICA,) Case No. CR 07 0732 SI
28 Plaintiff,)
vs.) **DEFENDANT'S MEMORANDUM ON**
BARRY LAMAR BONDS,) **DISTRICT COURT'S DISCRETION TO**
Defendant.) **DENY STAY OF PROCEEDINGS**
) **PENDING GOVERNMENT APPEAL**
)

29 On the eve of Mr. Bonds' trial, the government has informed the Court that it will appeal
30 an order of the Court issued eight days ago excluding certain evidence from admission. The
31 government correctly notes that it has a right to an interlocutory appeal of that order under 28
32 U.S.C. section 3731, and on that basis claims a right to an automatic stay of trial proceedings.
33 But halting those proceedings, scheduled to begin on Monday morning, will result in a waste of
34 considerable judicial resources already expended in the jury selection process. Furthermore, it

1 will frustrate Mr. Bonds' interest in now putting this matter, alleging offenses occurring more
2 than five years ago, behind him once and for all.

3 At this morning's proceedings, the government argued that the Court essentially has no
4 discretion to deny a stay because an appeal would divest the court of jurisdiction to proceed with
5 the trial. Contrary to the prosecution's claim and notwithstanding the appeal, however, this
6 Court does in fact, retain jurisdiction and with it, the discretionary power to deny a stay. As the
7 Ninth Circuit explained in *United States v. Gatto*, 763 F.2d 1040 (9th Cir.1985), although a
8 notice of appeal usually divests the district court of jurisdiction, “[s]ection 3731 appeals . . . are
9 not usual.” *Id.*, at 1049. Accordingly,

10 The government has a conditional right [under section 3731] to
11 appeal [an order suppressing evidence], but the exercise of this
12 right may result in a disruptive effect on the criminal trial process,
13 therefore harboring a potential for abuse. As a result, the
14 government's right to appeal pretrial suppression orders must be
balanced with a defendant's right to proceed to trial on the
indictment. This can best be accomplished . . . by retaining
jurisdiction in the district court to dismiss the indictment in
appropriate cases.

15 *Gatto*, 763 F.2d at 1050 (emphasis added; internal citation omitted)

16 If the Court enters a dismissal order, the government will have the right to appeal both the
17 February 19th exclusionary order and the dismissal order itself. If it prevails, as it did in *Gatto*, it
18 will be able to proceed to trial with all of its intended evidence, so its right to a meaningful
19 appeal will be fully preserved. On the other hand, the prosecution's last-minute decision to
20 proceed with the appeal obviously has a disruptive effect on this Court's proceedings. The harm
21 to defendant's interest in obtaining a timely resolution to the case is equally apparent. If the
22 Court dismisses the case and its exclusionary and dismissal orders are sustained, the matter will
23 be laid to rest without further expenditure of this Court's resources or prejudice to the
24 defendant's interest in a speedy trial.

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CONCLUSION

The Court should deny any stay request and, should the prosecution decline to proceed in light of the exclusionary order, enter an order dismissing the indictment.

Dated: February 27, 2009

Respectfully submitted,

LAW OFFICES OF ALLEN RUBY

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